

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOE WEISS

Claimant

VS.

FARROW AMUSEMENTS

Respondent

AND

GAB ROBBINS

Insurance Carrier

AND/OR

WORKERS COMPENSATION FUND

Docket No. **259,422**

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Bruce E. Moore on April 16, 2001.

ISSUES

The Administrative Law Judge found that the claimant's accidental injury arose out of and in the course of his employment and designated Dr. Niazi the authorized treating physician, authorized medical treatment to be paid and ordered temporary total disability benefits at the rate of \$166.68 per week from October 6, 2000, until claimant is released to return to work.

Respondent raises the following issues on review: (1) whether the claimant's accidental injury arose out of and in the course of his employment with the respondent; and, (2) whether the claimant has met his burden of proof to establish that he is temporarily and totally disabled.

The claimant contends the Administrative Law Judge's decision should be affirmed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Joseph Weiss Jr. was employed by Farrow Amusements and helped construct the rides. On September 7, 2000, he was working on a ride called the flume which consists of a log that people sit in and ride through a trough of water.

Mr. Weiss testified that he stepped down into the trough on his left foot and was transferring weight and turning when he heard a crack and his left leg buckled. He then fell back to the right onto his right leg and side. Mr. Weiss testified that his left foot was in the trough and he was getting ready to step down into the trough with his right foot when he felt and heard the pop and he fell. He estimated the depth of the trough was about 18 inches or above his knee.

Mr. Weiss was taken by ambulance from the Kansas State Fairgrounds to the hospital. He was diagnosed with a left femur spiral fracture. He had surgery wherein a rod was implanted through the fracture.

The contemporaneous medical records from the Hutchinson Hospital indicate that claimant had a left total hip replacement in 1977. The records further note that claimant admitted his left hip had been bothering him, he had dislocated it six or seven months before and that he believed the replacement was loose. X-rays confirmed a loose total hip replacement with broken cerclage wires around the greater trochanter.

The hospital medical notes further reflect claimant indicated that maybe his left total hip replacement caused him to fall awkwardly. Dr. Niazi's operative notes contain the comment that claimant believes he fell because his loose hip had subluxed making him fall as he only stepped down from 8-10 inches.

The respondent contends the injury is not compensable because it was due to a personal preexisting condition. Respondent argues that the fall was the result of the loose left hip replacement which subluxed causing the claimant to fall.

Where an injury is clearly attributable to a personal condition of the employee, and no other factors intervene to cause or contribute to the injury, no compensation award is allowed. Where the injury is the result of the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed. *Bennett v. Wichita Fence Company*, 16 Kan. App.2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992).

Assuming that claimant's loose hip replacement gave out as argued by the

respondent, such an event would meet the concurrence standard of *Bennett*, especially where the claimant was not only awkwardly stepping down but also across the trough in the amusement ride when he fell. The Board concludes the claimant has met his burden of proof to establish that he sustained accidental injury arising out of and in the course of employment.

The respondent next argues that if the claim is compensable, there is no medical evidence in the record to establish that claimant is temporarily totally disabled.

The Board has limited jurisdiction on appeals from preliminary hearing orders. The Board may review allegations that an administrative law judge exceeded his or her jurisdiction, including allegations that the administrative law judge erred on jurisdictional issues listed in K.S.A. 44-534a, as amended. However, every allegation of error does not constitute a jurisdictional issue. Jurisdiction is described in *Allen v. Craig*, 1 Kan. App.2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977), as follows:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly. (Citations omitted.)

The workers compensation administrative court has limited jurisdiction. Its subject matter jurisdiction is limited to cases involving accidental injury arising out of and in the course of employment. Whether claimant suffered accidental injury and whether the injury arose out of and in the course of employment are, therefore, designated in K.S.A. 44-534a, as amended, as jurisdictional issues. Personal jurisdiction requires notice and timely written claim. Notice and written claim are also designated as jurisdictional issues under K.S.A. 44-534a, as amended. Whether the administrative law judge should, in a given set of circumstances, authorize temporary total disability compensation is not a question that goes to the jurisdiction of the administrative law judge. K.S.A. 44-534a, as amended, specifically grants an administrative law judge the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. Therefore, the Administrative Law Judge did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 16, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2001.

BOARD MEMBER

pc: Matthew L. Bretz, Attorney, Hutchinson, Kansas
Rex W. Henoch, Attorney, Lenexa, Kansas
Jeffrey E. King, Attorney, Salina, Kansas
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director